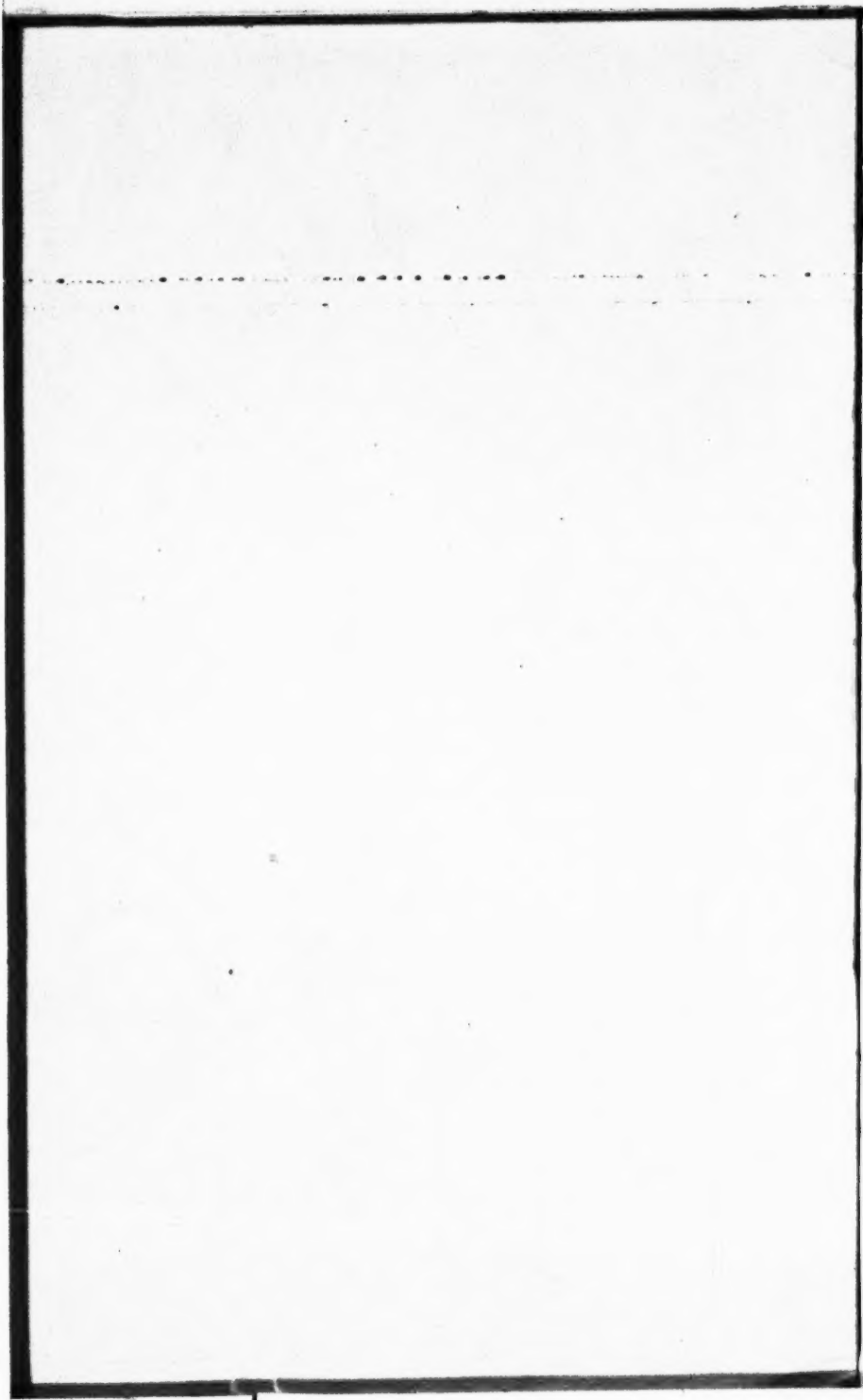

SUPREME COURT, U. S.

FILED

JAN 22 1974

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

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NO. 73-547

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JOE GUERRA,

Petitioner

VS.

STATE OF TEXAS AND
JOHN L. HILL, JR., AS
ATTORNEY GENERAL OF THE STATE OF TEXAS,

Respondent

• • •

Petition for Writ of Certiorari
to the Court of Criminal Appeals
of the State of Texas

• • •

RESPONDENT'S BRIEF IN OPPOSITION

• • •

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is sought here is reported in *Guerra v. State of Texas*, 496 S.W.2d 92 (Tex.Crim., 1973). A copy of that opinion is attached to the petition herein.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

Although the Petitioner in the initial portion of his brief raises only the broad question of a violation of his Fourth Amendment rights, the latter portion of Petitioner's brief details two specific charges. Respondent will frame his questions to cover these charges.

1. Was the search of the person of Petitioner in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution because the search warrant in question did not extend to and authorize a search of the person of the Petitioner, the search of the Petitioner was not conducted incidental to a prior lawful arrest, and the search of the person of Petitioner was not supported by nor based on probable cause?

2. Was the search of the person of Petitioner in violation of his rights as set forth in the Fourth Amend-

ment to the United States Constitution and Article I, Section 9 of the Texas Constitution, because the affidavit in support of the search warrant in question did not reflect probable cause for the issuance of the search warrant and because the affidavit was based on hearsay information from an un-named informant and did not contain sufficient information to credit or corroborate the hearsay information, and reliability of the un-named informant?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution are involved here.

STATEMENT OF THE CASE

Petitioner was indicted for the unlawful possession of a narcotic drug (to wit: heroin) by a grand jury for the 140th District Court of Lubbock County, Texas. He was tried before a jury and convicted. Petitioner's record of two prior felony convictions for burglary and murder without malice was introduced along with evidence as to Petitioner's character and reputation. The jury assessed his punishment at forty (40) years in the Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed this conviction. *Guerra v. State of Texas*, 496 S.W.2d 92 (Tex.Crim., 1973).

On April 26, 1971, Detective Gary Davis of the Lubbock Police Department signed an affidavit before the Honorable Charles Smith, Justice of the Peace of Lubbock County, Texas, stating that the narcotic drug heroin and narcotic paraphernalia were being unlawfully possessed at 2602 Bates, Lubbock, Lubbock County, Texas, which

address was occupied and controlled by Petitioner Guerra and Mary Lou Alverez and a person or persons whose names and descriptions were unknown. Detective Davis stated in his affidavit that his reliable and credible informant had personally observed such narcotic drug and paraphernalia upon the premises within seventy-two (72) hours of the signing of the affidavit and that Detective Davis had received information from this informant in the past which had proved to be true and correct.

Judge Smith issued a search warrant for the premises and it was served by Detective Davis and other officers on the same date. Petitioner denied the officers entry into the premises and reasonable force was used to gain entry. Petitioner was handcuffed to prevent disposal of evidence and for the protection of the officers conducting the search. The said officers knew of prior threats made by Petitioner against other officers and of assaults upon officers by Petitioner in the past. (R. 187). The handcuffs were subsequently removed from Petitioner in order to conduct a thorough search of his person, as he was specifically named in the search warrant. A quantity of heroin was discovered in his pants pocket. Petitioner then attempted to swallow or otherwise dispose of the heroin and was restrained and handcuffed again, placed under arrest and warned of his rights.

ARGUMENT AND AUTHORITIES

1. The search of the person of Petitioner was not in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution because the search of the person of Petitioner was based on

probable cause and because Petitioner was not arrested until after the narcotics had been found on his person.

Petitioner contends that a warrant to search a particular premises does not carry with it the right to search the person or the people occupying and controlling said premises. In the instant case, the search warrant was issued because a reliable informant made known to the police that he had seen heroin at 1602 Bates, Lubbock, Texas, within seventy-two hours of the issuance of the warrant. It is undisputed that said premises were occupied and controlled by Petitioner. The police, in conducting their search of the premises, had probable cause to search the person of Petitioner. The officers executing the warrant may search all parts of the premises which would reasonably be expected to afford a haven or cache for the items sought in the search. If stolen television sets are the subject of the search, the officers may look in the various rooms, in closets and in other areas where television sets could be secreted. If stolen diamonds or heroin are the subject of the search, then the officers may look into small drawers, search the pockets of garments hanging in closets, look under bed clothes, examine medicine and kitchen cabinets and other areas where small items could be hidden away.

In connection with the search for small items of evidence, contraband, or stolen merchandise, a person on the searched premises must necessarily occupy the same position as a piece of furniture, a household fixture, or a piece of wearing apparel that may be hanging in a closet or draped over the back of a chair. Any person on the premises is much like a piece of furniture—his pockets are

areas where the items for which the search is conducted may be located.

A decision philosophically supporting the search made in the present case *United States v. Johnson*, 475 F.2d 997 (D.C. Cir., 1973). The search of a purse was involved in that case, but the reason the court gave for upholding the search makes that decision analogous to the instant case (475 F.2d at 979):

> "In *Walker v. United States*, 117 U.S.App.D.C. 151, 327 F.2d 597, 600 (1963), cert. denied, 377 U.S. 956. 84 S.Ct. 1635, 12 L.Ed. 2d 500 (1964), this court permitted the search of a wallet and bag held by one who shared occupancy of the residence searched under authority of a warrant, holding that a contrary result 'would be to suggest that a warrant to search premises may be frustrated by the device of simply picking up the guilty object and holding it in one's hand.' Similarly here, frustration of the warrant's purpose should not be permitted where the facts reveal that to be the likely result were the purse not searched. See *Clay v. United States*, 246 F.2d 298, 304 (5th Cir.), cert. denied, 355 U.S. 863, 78 S.Ct. 96, 2 L.Ed.2d 69 (1957). . . ."

The facts in the instant case reveal that the search of the Petitioner occurred in the course of the search of the premises rather than after and apart from such search as the Petitioner contends. The Lubbock police officers, after obtaining the search warrant (R. 128, 152) went to Petitioner's premises, knocked on the door, identified themselves, and stated their purpose. Petitioner looked at the officers through a small window and moved off (R. 128, 153). The officers knocked again, but were denied entry (R. 154). A woman in the house was observed

moving hurriedly to the bathroom and a commode was flushed. The officers then forcibly entered the premises (R. 128, 154, 182, 208). An officer, exercising his right of reasonable restraint, then handcuffed Petitioner to prevent further disposal of evidence and for the protection of the officers and Petitioner based on the knowledge of Petitioner's dangerous propensities (R. 183, 185, 187, 188). A search of the premises was commenced some ten or fifteen minutes later (R. 191), during the course of said search, the handcuffs were removed from Petitioner so that he could be thoroughly searched. During that search, a "paper" of heroin was found in the watch pocket of Petitioner's pants (R. 191, 233, 234). Petitioner then attempted to take the heroin from the officer and to swallow it. The officers were forced to struggle with Petitioner to regain the heroin, and the handcuffs were again placed upon Petitioner. After, and only after, the heroin was discovered in Petitioner's pocket was he advised that he was under arrest and warned of his rights pursuant to the arrest warrant contained in the search warrant (R. 175, 189). Until that time, the officers testified that, although he was being temporarily detained until the search was completed, the Petitioner would have been released if no contraband had been found (R. 175, 188, 189).

The officers, therefore, had probable cause to search Petitioner. Petitioner was named in the warrant as owning and occupying the premises, Petitioner was on the premises when the officers arrived, and the narcotic that was the subject of the search was capable of being concealed on one's person. A ruling that a person owning and occupying a premises could not be searched under a warrant to search that premises would set up a zone of

safety for a person who may be selling heroin or concealing small, stolen property. This judicially created zone of safety would thusly frustrate the purpose of obtaining a search warrant.

2. The search of the person of Petitioner was not in violation of his rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution, because the affidavit in support of the search warrant in question did reflect probable cause for the issuance of the search warrant and because the information upon which the warrant was issued was supplied by a reliable informant who had personally seen heroin on the premises of the Petitioner.

Petitioner raises the question of whether the affidavit upon which the issuance of the search warrant was based established sufficient probable cause for the issuance of such warrant.

The affidavit in this case, in substance, stated that the affiant based his belief that heroin was being unlawfully kept upon Petitioner's premises upon information received from reliable and credible informant, that the said informant had personally observed heroin on the premises within seventy-two hours of the making of the affidavit, and that the affiant had received information from the said informant on previous occasions which had proven to be true and correct.

An affidavit for a search warrant may be based upon hearsay information and need not reflect the direct personal observations of the affiant. *Aguilar v. Texas*, 378

U.S. 108 (1964). The *Aguilar* case set out a two prong test by which the sufficiency of such hearsay information is to be tested:

> "(1) There must be contained in the affidavit some underlying circumstances from which the informant concluded that the contraband was where he claimed it to be.
>
> "(2) There must be contained in the affidavit some circumstances to show why the informant is deemed to be reliable."

It is respectfully submitted that both parts of the *Aguilar* test have been met by the affidavit in this case, the first part by the personal observation of the heroin upon the premises by the informant within seventy-two hours of the affidavit and the second by the previous successful reliance upon information furnished the affiant by the informant. Of course, further corroboration of the informant is only required where one of the *Aguilar* tests is not met.

In the case of *Spinelli v. United States*, 393 U.S. 410 (1968), Mr. Justice White, in a concurring opinion, deals precisely with the facts establishing cause for the issuance of a search warrant in a case like the one at hand:

> "If the affidavit rests on hearsay—and informant's report—what is necessary under *Aguilar* is one of two things: The informant must declare either (1) that he has himself seen or received the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it . . . The first presents few problems: since the report, although hearsay, purports to be the first hand observation, remaining

doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant . . ."

Thus personal observation of the informant coupled with previous successful reliance by the officer-affiant upon information from that informant clearly satisfied the *Aguilar* test.

Petitioner relies upon *Jones v. United States*, 362 U.S. 257 (1960), a case which preceded *Aguilar* by four years. *Jones* deals with an affidavit or a search warrant containing matters different from the present case, however in upholding that affidavit, the court stated that merely the belief of the affiant or his informant that there is probable cause to search will not be sufficient, but that personal observations of another will be sufficient where there is a substantial basis for crediting the information of that informant.

It is respectfully submitted that the affidavit of Detective Davis, wherein he states that his informant had personally observed heroin upon premises occupied and controlled by the Petitioner and that he had previously successfully relied upon information furnished by the said informant, clearly meets both prongs of the *Aguilar* test and establishes probable cause for the issuance of a valid search warrant.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States mail, postage prepaid, certified, on this the _____ day of January, 1974, addressed as follows: Mr. James A. Walters, Walters and Associates, Attorneys at Law, 1515 Avenue J, Lubbock, Texas 79401.

LONNY F. ZWIENER
Assistant Attorney General